

Justice Committee

Petition PE1449: Maintenance of a Scottish Council for Administrative Justice

Written submission from Dr John Wallace Hinton

Answer to the request in the Official Report of the Justice Committee 3rd June 2014

Tribunals and Administrative Justice Council Advisory Committee: Concerns and Recommendations

I submitted this petition having had first-hand experience of failures of administrative justice in several contexts and much knowledge of the experiences of others. I am therefore aware of the need for an Administrative Justice body which is able to investigate and act – hopefully effecting the necessary changes in official ‘cover-up’ cultures. Unlike the STAJAC it will need to be independent of government, allow direct input from the public and it requires more adequate financial support.

The media publicize a few striking cases of maladministration involving suicides or the skulduggery in Edinburgh City Council, but otherwise rarely shows interest. Most of the cases to have hit the headlines have been from more populous England, but is Scottish officialdom better? We have the SPSO, but however one judges the adequacy and effectiveness of his investigations, his job is to investigate *individual* acts of administration – not to analyse the administrative culture in which they flourish – and he is not qualified to make legal judgements.

Maladministration, service failures and poor administrative justice are bad enough, but insufficient attention is paid to the severe psychological effects on individuals produced by their frustrated efforts to achieve administrative justice for themselves or their communities. As a psychologist specializing in psychological stress, I am very aware of the serious effects of bureaucracy-induced stress responses – including mental and physical illnesses. Often these translate to substantial financial costs to be borne by the Scottish National Health Service and employers.

I was shocked when the Scottish Committee of AJTC Council was abolished in August 2013 and I have been informed of the great disappointment of all the former members of this Committee. I welcome the establishment of the interim Advisory Committee (STAJAC) earlier this year, and I understand that also to be the view of former SCAJTC members. However, I share their concerns at the **absence of any structure in Scotland which can exercise, monitor and review powers in respect of the reserved as well as devolved administrative justice matters in Scotland. The absence of clear guarantees of independence for STAJAC is a major concern** (ref. 1). It is to be hoped that, for the future of Scottish democracy, a powerful Administrative Justice body will be created which has the necessary independence and powers. Whilst the oversight of Tribunals is vitally important, I am concerned with Administrative Justice in the broadest sense, and maybe there is a need for two bodies, bearing in mind the range of Administrative Justice matters dealt with here.

I agree with the following statements made by Richard Henderson, former Scottish

AJTC Committee Chairperson (ref.1). He says: “Whatever the outcome of the upcoming referendum it is in my view imperative that the situation for administrative justice in Scotland is considered with the aim of securing integrated responsibility for all tribunals with jurisdiction in Scotland, that responsibility to lie with a Scottish institution. It is also imperative whatever the outcome of the referendum that the principles for an administrative justice system for Scotland, as recommended by the AJTC, are recognized by both Scotland’s Government and Parliament and that steps are set in place to secure their incorporation in the future development of administrative justice in this jurisdiction.

I have no doubt that a proper respect for administrative justice sits at the heart of any democratic country whether that is within a devolved or independent context, and whether Administrative Justice is to be seen as an integrated aspect of civil justice or separately. Administrative Justice is as, if not more, significant on a daily basis to citizens of this country than any other aspect of civil justice. It permeates the way decisions are taken which affect us individually, the way we are governed and the whole relationship between citizen and state.

To my mind, bearing in mind the asymmetric relationship between citizens and the state, it is axiomatic that the operation of the administrative justice system must be properly monitored and reviewed on a permanent basis, and that any such monitoring and review must be committed to a body which is independent of government, including any other structure which operates powers on behalf of government which directly affect the rights and interests of individual citizens.”

Some examples of where a Scottish Administrative Justice body should have powers of censure and powers to recommend statutory improvements, in reports to the Scottish Parliament

Public Authorities and officials are largely unaccountable and they often operate without transparency. They cover up for each other –(ref Hillsborough disaster, mid-Staffordshire NHS Trust fiasco, North Ayrshire & Arran patient safety cover-up (Rab Wilson, ref 2 & 3). Two submissions by myself and Dr Richard Burton to the SPSO concerned maladministration and service failure of Glasgow City Council, where Council officials lied (with impunity) to avoid censure. The SQA is only required to account to Scottish Parliament for its ‘systems’ not its errors in administration and its employees have a gagging order. The extent of the lack of accountability and the degree of cover-up by the SQA is illustrated in the Petition and Accountability Scotland Conference paper of Ian Thow (ref 3): his Petition was thrown out on the advice of officials with an interest in avoiding trouble. The School inspectorate is a law unto itself, not accountable to the SPSO, so social injustices cannot be censured and we have cases of dedicated Scottish head-teachers committing suicide or becoming seriously ill. In our extensive experience, the SPSO can dismiss complaints by using the arbitrary 12-month rule, when a proper consideration requires scrutiny of a long sequence of events. Also complainants can be denied access to critical correspondence on their cases from the body complained about. These strategies apply especially to complaints about council planning departments, public consultation inadequacies, errors in implementation of developments and extended lacks of enforcement of planning stipulations (ref.3).

A new Scottish Administrative Justice body should be empowered to ensure that there is complete openness in public bodies and that their complaint handlers are unconnected with the individuals or bodies complained about.

To ensure Administrative Justice in operation of our public services it should be obligatory for all employees to report faults in the system, just as it is in the aviation industry – faults in hospitals are just as important as faults in planes! For a start the elimination of employment confidentiality agreements and gagging orders should be enforced in all areas where issues of national security are not involved. The Scottish Health Secretary has introduced regulations for the Scottish NHS to stop gagging orders, but it needs an Administrative Justice Council to ensure that this is implemented.

A powerful AJTC would eliminate much of the load on the SPSO by ensuring that public bodies obeyed the law and got it 'right first time'. Whilst the SPSO should be obliged to attend meetings of the new body, it should not be part of it, as that would inhibit the necessary impartial oversight of its operations. So finally, the SPSO must be held to account for the operation of its **systems** as was stipulated in the remit of the Scottish Committee of AJTC. In fact, the **previous Scottish Committee of the AJTC was the only independent body that could report to Parliament on the fairness of the SPSO's systems and other matters of Administrative Justice. It is essential that this continues.**

Craigforth surveys show satisfaction rates of the SPSO to be exceptionally low by world standards. The Gibraltar ombudsman delivers almost 100% satisfaction, so the new Administrative Justice body should investigate and report on how the SPSO could achieve this, after exploring why the SPSO does so badly.

Composition of the Scottish Administrative Justice Council

The new Scottish Administrative Justice Council should be composed exclusively of independent lawyers with experience in the field of Administrative Justice and no connection to secret societies or any public body interests. The way they are appointed is critical, and they should not be political appointees, but voted into office by their qualified peer group

Public input to the Scottish Administrative Justice Council

The Council should be able to receive and act upon **direct input from the public** – e.g. from individual citizens, Community Councils and voluntary bodies.

Scrutiny of Proposed Legislation to ensure Administrative Justice in new laws

Scotland has no governmental body for the scrutiny of new laws in regard to administrative justice. Whether or not Scotland becomes independent with a written constitution, Parliament requires a legislation-revising body to ensure that its citizens are safeguarded from the use of arbitrary powers in the public services due to 'loose' regulations and lack of accountability and lack of transparency in the functioning of public bodies. Whilst the Scottish Parliament's committee system is admirable, and public consultations desirable, it is not enough: ultimately legislation must pass

independent legal scrutiny, and an expanded Scottish Administrative Justice Council could handle this.

The PASC report applied to the UK AJTC, but it is crucial to our Scottish case.

Please note especially its last paragraph: “The AJTC should be part of the machinery to help government get decisions ‘right first time’. Instead, over half a million decisions [in the UK] have to be reviewed each year, at great cost and considerable injustice and inconvenience to citizens.”

As Professor Tom Mullen points out (ref 4), there is a serious need for an Administrative Justice oversight policy and a necessity to maintain an oversight of official administrative systems – to identify weaknesses, and a need to help Government Departments with policy. And Professor Michael Adler (ref 2) has stated that the new Administrative Justice body should be “able to consider issues on its own initiative; proactive rather than reactive”.

Cost of a Scottish Administrative Justice Council

In Professor Mullen’s view (ref 4) it is not a problem to implement an Administrative Justice System, but the question is, will the Scottish Government pay for it? Professor Mullen suggested that half a million pounds would cover costs. However a million pounds pa may be required – a quarter of the cost of the bureaucracy of the SPSO (about which Alex Neil (ref 5) has quoted: ‘it’s not worth a farthing!’ - after considering its functioning and the degree of dissatisfaction.)

Summary of Recommendations

- 1) **Adequate funding to provide a proper secretariat** (initially at least 25% of what the SPSO receives).
- 2) **Guarantees of independence of government** (no party allegiances or secret society membership).
- 3) **Consist exclusively of highly qualified lawyers**, experienced in the field of Administrative Justice (say 9 as with the Supreme Court of the USA).
- 4) **No political influence in selection** of members for appointment. They should be voted as candidates by their lawyer peers and membership ratified by the Scottish Parliament.
- 5) **Security of tenure** (as with the USA Supreme court) to reduce risk of outside pressures regarding re-appointment. Members would hold office ad vitam aut culpam (i.e. they would lose office if they were guilty of corruption or other gross moral turpitude).
- 6) **The powers** should include the investigation and **reporting to parliament on:**
 - a) **Administrative Justice matters relating to public authorities and officials.**

b) Administrative Justice in proposed legislation.

Should be able to consider issues on its own initiative: proactive rather than reactive.

7) Input from individual citizens, Community Councils and voluntary bodies should be allowed.

Finally, **without Administrative Justice there can be no guarantee of the Social Justice** for which Scotland can be rightly proud as an important feature of its culture, so to oversee **it is imperative to have a powerful independent council.**

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Petitioner: Petition PE1449
(A S Convener retired)
31 August 2014

References:

(1) **Letter from Richard Henderson** (ex Chair of Scottish Council of the AJTC) 26.08.14. Quotes made from this with his permission.

(2) <http://www.dailyrecord.co.uk/news/health/whistleblower-nurse-vindicated-as-nhs-board-1129105>

(3) Making Scottish Public Services Accountable

Accountability Scotland Conference The Scottish Parliament Committee Room 3 Monday 16th Sept 2013, (Supported by Glasgow human Rights Network). Proceedings published on Accountability Scotland website: <http://accountabilityscotland.org.uk>

(4) Petition PE1449

(5) Alex Neil MSP speaking in support of eight petitions lodged by constituents at Petitions Committee hearing, Scottish Parliament calling for the Scottish Government to commission an independent review of the SPSO. The petitions, PE1342, PE1343, PE1344, PE1345, PE1346, PE1347, PE1348, and PE1349. 9 September 2010.